

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

CARLOS LOPEZ,

Defendant.

16 Cr. 317-22 (PAE)
19 Civ. 3463 (PAE)

ORDER

PAUL A. ENGELMAYER, District Judge:

In 2018, Judge Forrest, then presiding over this case, sentenced defendant Carlos Lopez to 120 months' imprisonment. On April 14, 2019, Lopez filed a *pro se* motion to vacate his sentence under 28 U.S.C. § 2255. At the time, his direct appeal of his conviction was pending. As a result, on May 16, 2019, the Court, since reassigned to this case, denied his motion, citing "prudential concerns of 'judicial economy,'" and that the pending appeal could "make the district court's efforts on the § 2255 motion a nullity." 19 Civ. 3463, Dkt. 5 at 1 (quoting *United States v. Outen*, 286 F.3d 622, 632 (2d Cir. 2002)). The Court did so without prejudice to Lopez seeking future relief after his pending appeal was resolved. *Id.* at 2. On August 5, 2019, Lopez appealed that denial. *Id.*, Dkt. 6; *see id.*, Dkt. 10 at 1–2. On August 6, 2019, the Second Circuit decided Lopez's direct appeal. No. 16 Cr. 317, Dkt. 623. It dismissed the appeal and granted the Government's motion for summary affirmance, with one exception: as to one special condition of supervised release, the Circuit vacated and remanded for resentencing, directing the Court to clarify a discrepancy between the Court's sentencing remarks and its written judgment. *Id.* at 1–2. On November 5, 2020, the Court resentenced Lopez and issued an amended judgment. *See Id.*, Dkt. 660. Lopez never filed another § 2255 motion.

On March 1, 2021, the Circuit, in considering Lopez's appeal of his May 2019 § 2255 denial, issued the attached order. In it, the Circuit *sua sponte* found Lopez's appeal to be untimely, but construed his notice of appeal as a timely motion either for an extension of time to appeal or to reopen the time to appeal, under Fed. R. App. P. 4(a)(5) and (6). *See* 19 Civ. 3463, Dkt. 10 at 1–2. And it directed this Court to consider whether, so construed, Lopez is entitled to relief under either provision. *Id.*

In the Court's view, Lopez may not stand to gain much by pursuing the appeal of the Court's May 2019 denial. That decision was procedural, without prejudice, and did not purport to address the merits of Lopez's 2019 claims of, *inter alia*, ineffective assistance of counsel. *See id.*, Dkt. 5. Thus, it appears that, assuming his time to do so has not expired, Lopez would be better served by renewing those substantive claims now, rather than pursuing the appeal of the 2019 denial. However, in light of the complex history here, and time bars potentially imposed by § 2255(f) and Fed. R. App. P. (4)(a)(1)(A), the Court hereby orders as follows.

The Court reappoints Lopez's most recent counsel in his criminal case, Florian Miedel, for the limited purpose of responding to this order. The parties shall inform the Court of their views as to how best to proceed in light of the above. Mr. Miedel's submission, on Lopez's behalf, is due by March 10, 2021. The Government's submission is due by March 15, 2021. Those submissions should address whether Lopez is entitled to relief under Fed. R. App. P. 4(a)(5) or (6), and whether he is able to file a new § 2255 motion bringing his claims of ineffective assistance of counsel, given the Court's May 2019 denial without prejudice to his doing so, the Circuit's August 2019 decision in his direct appeal, and the Court's issuance of an amended judgment in November 2020.

SO ORDERED.

A handwritten signature in blue ink, reading "Paul A. Engelmayer", is positioned above a horizontal line.

PAUL A. ENGELMAYER
United States District Judge

Dated: March 2, 2021
New York, New York

S.D.N.Y.–N.Y.C.
19-cv-3463
Engelmayer, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of March, two thousand twenty-one.

Present:

José A. Cabranes,
Gerard E. Lynch*,
Circuit Judges.

USDC SDNY
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DOC #:
DATE FILED: March 1, 2021

Carlos Lopez,

Petitioner-Appellant,

v.

19-2451

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability (“COA”) and for the appointment of counsel. This Court has determined sua sponte that the notice of appeal was untimely filed. *See* 28 U.S.C. § 2107(a); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). However, in his notice of appeal, which was filed within the time to file a motion for an extension of time to appeal as well as a motion to reopen, Appellant stated that he did not receive the district court’s order until two days after the time to appeal had already expired. Fed. R. App. P. 4(a) (5), (6). Thus, Appellant’s notice of appeal could be construed as a motion for an extension under Fed. R. App. P. 4(a)(5) or a motion to reopen under Fed. R. App. P. 4(a)(6). *See Campos v. LaFevre*, 825 F.2d 671, 676 (2d Cir. 1987).

*Judge Debra Livingston, originally assigned to the panel, recused herself from consideration of this matter. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b). *See* 28 U.S.C. § 46(d); *cf. United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998).

Accordingly, it is hereby ORDERED that decision on Appellant's motions are DEFERRED. The district court is directed to construe Appellant's notice of appeal as a motion for an extension of time to appeal or a motion to reopen the time to appeal under Fed. R. App. P. 4(a)(5) and (6), and to consider whether Appellant is entitled to relief under either provision. It is further ORDERED that the parties shall notify this Court of the district court's decision within 30 days of its entry on the district court's docket sheet. The matter will thereafter be referred to a new motions calendar in the normal course.

FOR THE COURT:



Catherine O'Hagan Wolfe, Clerk of Court

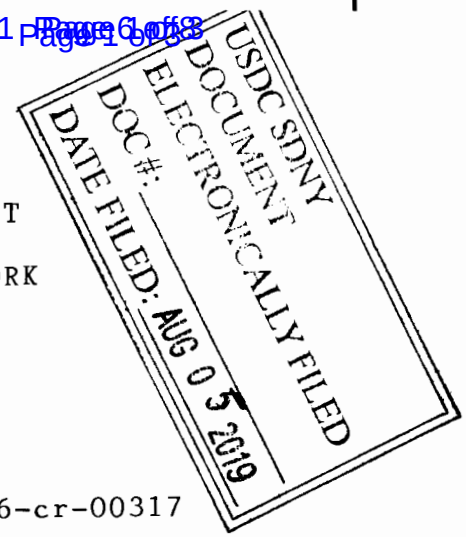
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Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CARLOS ANDREW LOPEZ, :
PETITIONER, : Crim No: 1:16-cr-00317
: Civil No: 1:19-cv-03463
: USM No: #79367-054
v : HONORABLE PAUL A ENGELMAYER
:
:
UNITED STATES OF AMERICA, : **NOTICE OF APPEAL**
RESPONDENT. :

NOTICE IS HEREBY GIVEN THAT, CARLOS ANDREW LOPEZ, the Petitioner Pro Se, hereby appeals to the Second Circuit Court of Appeals, from the **FINAL JUDGEMENT DENYING** is Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 USC B 2255, and **ALL** pleadings related thereto, entered for the record in the above action on the 26th day of May, 2019, but received by the Petitioner, via US Mail, on July 17, 2019.

Respectfully submitted on this 21st day of July, 2019.

/s/ Carlos Lopez
CARLOS ANDREW LOPEZ, PRO SE
FCI Gilmer PO Box 6000
Glenville, WV 26351-6000

CERTIFICATE OF SERVICE

I, CARLOS A LOPEZ, hereby certify that I have served a true and correct copy of the foregoing instrument, Notice of Appeal, by placing such instrument in the internal legal mailing system (see Houston v Lack, 487 US 266, 270 (1988)), located at FCI Gilmer, 201 FCI Lane, PO Box 5000, Glenville, WV 26351-5000, on this 21st day of July, 2019, via US Postal Service, first class mail, postage pre-paid and mailing said instrument to the following address:

Clerk, US District Court
Southern District of NY
500 Pearl Street
New York, NY 10007

Executed under the penalty of perjury, pursuant to 28 USC
B 1746.

/s/ Carlos Lopez
CARLOS ANDREW LOPEZ

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CARLOS ANDREW LOPEZ
JSM No: #79367-054
Federal Correctional Institution
FCI Gilmer PO Box 6000
Glenville, WV 26351-6000

LEGAL CORRESPONDENCE

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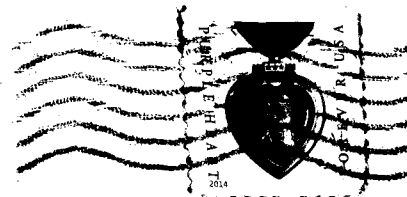
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New York, NY 10007



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